84-1189

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October 1984 Term

STATE OF NORTH CAROLINA, in relationship with JOHN C. GRIER, JR.;

Petitioner

V.

BOARD OF COMMISSIONERS FOR MOORE COUNTY et al.;

Respondents

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI

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QUESTION PRESENTED

I. Does Dr. Grier's complaint, alleging the intentional violation of state procedures by state officials in seizing Dr. Grier's property, the subsequent reckless disregard for such property while in the state officials' custody and control, and criminal misconduct by state officials in stealing Dr. Grier's property and conspiring to obstruct justice, state a claim for a substantive due process violation, actionable pursuant to 42 U.S.C. §1983?

LISTING OF PARTIES

The parties to this proceeding are JOHN C. GRIER, JR., M.D., Petitioner, and the BOARD OF COMMISSIONERS FOR MOORE COUNTY; LEE WILLIAMS, individually and in his official capacity as Chairman of the Board of Commissioners for Moore County; CARL W. SELLERS, individually and in his official capacity as Delinquent Tax

EDITOR'S NOTE

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Collector for Moore County; DON A. RICHARDSON, individually and in his official capacity as Tax Collector for Moore County; JEROME L. WHIPPLE, individually and in his official capacity as Sheriff of Moore County; JOHN DOE, INC., an unknown surety on the official bonds for various defendants; and the COUNTY OF MOORE, Respondents. The State of North Carolina has not appeared in this action and is a party in relation with the Petitioner only in the ninth cause of action which is brought against the official bonds of various defendants pursuant to N.C. Gen. Stat. § 109-34.

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OPINIONS BELOW

The Honorable Hiram H. Ward, United States District Judge, Middle District of North Carolina, dismissed Petitioner's complaint on December 19, 1983. Judge Ward's Memorandum Opinion and Order is unpublished. A copy of such Opinion is reproduced in the Appendix.(A1)

The United States Court of Appeals for the Fourth Circuit affirmed the District Court Order of Dismissal in an unpublished Opinion dated September 27, 1984. A copy of the Fourth Circuit's Opinion is included in the Appendix.(A15)

JURISDICTION

This Petition is filed within 90 days of the Judgment entered in the United States Court of Appeals for the Fourth Circuit on September 27, 1984, as required by 28 U.S.C. §2101(c). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Fifth Amendment

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. Fourteenth Amendment

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . .

3. 42 U.S.C. §1983

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

The Petitioner, John C. Grier, Jr., M.D. (hereinafter "Dr. Grier"), initiated this action for damages pursuant to 42 U.S.C. §1983. The complaint also asserts pendent state law claims for negligence, trespass, conversion, breach of fiduciary obligations, fraud and claims upon the various bonds executed on behalf of Defendants. The Respondents include the Board of Commissioners of Moore County,

Lee Williams, Chairman of said Board, Carl W. Sellers, delinquent Tax Collector for Moore County, Don A. Richardson, Tax Collector for Moore County, Jerome L. Whipple, Sheriff of Moore County, the County of Moore and the surety on the official bonds for the various Defendants.

In an Opinion and Order filed December 19, 1983, the Honorable Hiram H. Ward, District Court Judge, dismissed the complaint pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure, without a hearing. Judge Ward held that the availability of state tort remedies provided Dr. Grier with sufficient due process so that, as a matter of law, no constitutional violation was stated in the complaint. [Relying on Parratt v. Taylor, 451 U.S. 527 (1981) (hereinafter "Parratt"); and Palmer v. Hudson, 697 F.2d 1220 (4th Cir. 1983), cert. granted, ___ U.S. ___, 77 L.Ed.2d 1386 (June 27, 1983),

subsequently reversed in part and affirmed in part, 52 U.S.L.W. 5052 (July 3, 1984).

Dr. Grier is the former owner of the Holly Hills Golf Course and Club (hereinafter "golf course") located in the Pinehurst area of North Carolina. In 1976-1979, real property taxes assessed against the golf course property became due and owing to Moore County, North Carolina, in an amount of less than $2,000 per year. The taxes were not promptly paid (at trial Dr. Grier would testify that the taxes were not paid when due because he had raised questions regarding the assessment with the County which were unresolved), but subsequently have been fully paid by Dr. Grier out of his personal funds.(A40-41)

On June 6, 1980, Respondent Sellers, the delinquent Tax Collector for Moore County, seized the golf course premises based upon authority purportedly granted

by the Board of Commissioners for Moore County to levy for overdue taxes. Sellers' notice of levy recites in pertinent part that "pursuant to an order of the Board of Moore County Commissioners issued under authority of G.S. 105-321 and duly entered in the minutes of said board on Sep. (sic) 4, 1979,..." Carl W. Sellers, "in accordance with North Carolina General Statutes 105-366 and 105-367 levied on the following described articles of personal property.....

> All personal property within this building known as the clubhouse or pro-shop that is owned, rented or leased by the taxpayer named above."(A42-43, 63)

As stated in the complaint, the minutes for the Board of County Commissioners, nowhere reflect any order authorizing a levy against the subject property.(A43) In addition to the personal property located in the clubhouse and listed on the Notice of Levy, Respondent Sellers also

seized the maintenance shed located on the golf course, and the tools and equipment, including the watering heads to the golf course sprinkler system, by locking the gate to the maintenance shed with a heavy chain and lock and by denying the property owners all access to the shed.(A43-44)

On the day of the seizure, Dr. Grier complained to Respondents Sellers, the Moore County Board of Commissioners, and the Moore County Tax Collector that without access to the maintenance shed the golf course would suffer great damage in the hot, dry, summer weather. Dr. Grier requested access to the maintenance shed and equipment so that the golf course could be watered and maintained. Respondents Sellers, Richardson and Williams each refused to allow Dr. Grier to maintain the property, and further, each Respondent failed to take any action themselves, or on behalf of Moore County, to maintain the

property. The property went unattended and the grass on the fairways and around the course became burned out and destroyed, while the areas protected from the sun became overgrown.(A45-48)

At the foreclosure sale, Respondent Sellers sold various items of maintenance equipment, tools and numerous golf carts located in the maintenance shed. No accounting has ever been made to Dr. Grier regarding the proceeds of such sale. After the sale, Dr. Grier discovered that the clubhouse had been burglarized and that all of the property kept in that building -- golf balls, golfing apparel, and snack shop appliances -- had been stolen. Dr. Grier's complaint alleges that Respondent Sellers committed the burglary and then conspired with Jerome L. Whipple, the Sheriff of Moore County, and the other Respondents, to cover up the investigation.(A49-51, 55)

Dr. Grier bases his substantive due process claim upon the allegations that the Respondents, acting under color of state law, deprived him of his property without due process of law, as follows:

1. Sellers, with the knowledge and acquiescence of the other Respondents, intentionally violated North Carolina General Statutes by falsifying the notice of levy and by never obtaining authority from the Board of Commissioners to levy on the golf course property.

2. Sellers, with the knowledge and acquiescence of the other Respondents, knowingly and intentionally seized property not designated in the notice of levy, including the maintenance equipment which was vital to preserve the property, and he denied the owners all access to the golf course property. Additionally, Sellers burglarized the clubhouse and converted Dr. Grier's property to his own use.

3. Respondents failed to account for the proceeds of the sale of Dr. Grier's property, and the county never credited Dr. Grier for such amounts against the outstanding tax balance.

4. Each of the Respondents intentionally or recklessly violated

state statutes and the common law in failing to maintain perishable property seized and under their control.

5. Each of the Respondents deprived Dr. Grier of his property without due process of law by agreeing and conspiring to obstruct justice in covering up the burglary.(A52-55)

REASONS FOR GRANTING THE WRIT

I. Preface

The Petitioner respectfully urges the United States Supreme Court to review the merits of this action pursuant to Rule 17.1(c), Title 28, United States Code, Rules of the United States Supreme Court. This petition presents an important question of federal law, addressed by the Fourth Circuit in its opinion in this action, which has not been, but should be, settled by the United States Supreme Court.

The Fourth Circuit's opinion recognizes that a complaint alleging the deprivation of property by a state official without due process of law, must be

analyzed in terms of both procedural and substantive due process violations.(A30) Various Justices of the United States Supreme Court have indicated in separate opinions that substantive due process claims are outside the scope of Parratt v. Taylor, 451 U.S. 527 (1981),[1] nowever, the Court has not squarely addressed tne substantive due process issue.[2] This action provides the opportunity for the United States Supreme Court to recognize and particularize claims alleging a substantive due process violation.

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[1]See, Palmer v. Hudson, ___ U.S. ___, 52 U.S.L.W. 5052, 5058 n. 4, and 5060 (July 3, 1984) (O'connor, J, concurring, and Stevens, J, joined by Brennan, J, Marshall, J, and Blackmun, J, concurring in part and dissenting in part); Parratt v. Taylor, 451 U.S. 527 (1981) (Blackmun, J, joined by White, J, concurring, and Powell, J, concurring in the result).

[2]See, Wells & Eaton, Substantive Due Process and the Scope of Constitutional Torts, 18 Ga. L. Rev. 201, 203 (1984), and the cases cited therein. (hereinafter, "Wells & Eaton, Substantive Due Process").

The Fourth Circuit admits that "substantive due process claims need not be limited to wrongdoing that meets the 'shocks the conscience' standard" extrapolated from this Court's opinion in Rochin v. California, 342 U.S. 165 (1952), however, the Fourth Circuit suggests no alternative factors or guidelines to identify substantive due process claims.(A29) The lower courts and commentators have voiced the need for Supreme Court guidance in this area. See, Wells & Eaton, Substantive Due Process, supra., 18 Ga. L. Rev. 201, 235 N. 133. Because of the important federal question addressed in this petition, and the need for Supreme Court direction in identifying a substantive due process violation and in defining the scope of such claims, Dr. Grier petitions this Court to review the merits of this action.

II. DR. GRIER'S ALLEGATIONS THAT RESPONDENTS INTENTIONALLY VIOLATED STATE PROCEDURES IN SEIZING HIS PROPERTY, AND THAT THE RESPONDENTS WERE RECKLESS IN THEIR DISREGARD FOR THE CARE OF SUCH PROPERTY WHILE IN THEIR CUSTODY AND CONTROL, AND THAT RESPONDENTS COMMITTED CRIMINAL VIOLATIONS IN CONVERTING DR. GRIER'S PROPERTY AND IN OBSTRUCTING JUSTICE, STATE A CLAIM FOR A SUBSTANTIVE DUE PROCESS VIOLATION, ACTIONABLE PURSUANT TO 42 U.S.C. §1983.

A section 1983 claim for damages must rely on some federal statutory or constitutional violation committed by a state actor. Parratt, supra, 451 U.S. at 535. Dr. Grier complains that the Respondent state actors deprived him of property without due process of law, in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

It is sufficiently established that due process of law encompasses at least some guarantee of procedural safeguards against coercive government action. See, e.g., Fuentes v. Shevin, 407 U.S. 67 (1972). Not all government takings are

constitutionally barred. The Constitution only forbids a taking that is without due process of law, and without just compensation. See, Baker v. McCollan, 443 U.S. 137, 145 (1979).

Parratt held that a negligent deprivation of property by state officials was not without due process of law, where state tort procedures provided an adequate remedy to the victim. Consequently, Parratt's section 1983 claim was dismissed because no constitutional violation had been alleged; the taking was accompanied by adequate procedural safeguards, that is, with due process of law. Palmer v. Hudson, 52 U.S.L.W. 5052 (July 3, 1984), logically extended Parratt in the context of procedural due process analysis. Palmer held, in part, that a state actor's intentional deprivation of a prisoner's property is also not without due process of law, where state law provides adequate procedural

avenues to pursue a remedy. The District Court in this action applied Parratt and the Fourth Circuit's holding in Palmer v. Hudson, 697 F.2d 1220 (4th Cir. 1983), which was subsequently affirmed in relevant part by the United States Supreme Court, 52 U.S.L.W. 5052 (July 3, 1984), to dismiss Dr. Grier's complaint for failure to state a procedural due process violation.

The due process clause, however, requires more than procedural regularity. It is well established that due process of law also guarantees certain substantive rights which cannot be abrogated, regardless of the procedural protections afforded to accomplish the taking. See, Wells & Eaton, Substantive Due Process, supra, 18 Ga. L. Rev. 203, and the cases cited therein, particularly at n. 10. The United States Court of Appeals for the Fourth Circuit agreed in its opinion in this action that if Dr. Grier properly

alleged a substantive due process violation then the District Court erred in relying on Parratt to dismiss Dr. Grier's complaint.(A30)

The United States Supreme Court, while recognizing the substantive aspect of the due process clause, has not provided adequate direction to the lower courts in analyzing a section 1983 claim for damages resulting from a substantive due process violation. The Supreme Court must delineate some guidelines for the lower courts to distinguisn between wrongs which merely sound in common-law tort, and those which allege a fundamental violation which is constitutionally guaranteed, and therefore not subject to modification by state policies and interpretation. See, Jackson v. City of Joliet, 715 F.2d 1200 (7th Cir. 1983) (No problem so perplexes the federal courts today as defining the boundary between common law and constitutional torts);

see also, Wells & Eaton, Substantive Due Process, supra, 18 Ga. L. Rev. 203, and particularly the cases cited at n. 133. Because substantive due process claims are not necessarily founded on specific enumerated guarantees identified in the Bill of Rights, the substantive due process claim may cause the most confusion in distinguishing common-law tort claims from those claims that suggest fundamental constitutional infringements, actionable pursuant to 42 U.S.C. §1983.[3]

Maintaining the boundary between common law and constitutional tort, and

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[3] See, e.g., City of Revere v. Massachusetts Gen. Hosp., ___ U.S. ____, 103 S.Ct. 2979 (1983) (city has constitutional obligation under due process clause to secure medical attention for criminal suspect shot during his arrest); Youngberg v. Romeo, 457 U.S. 307 (1982) (due process clause requires that government protect persons involuntarily committed to mental health facilities from assaults by other patients); Parratt v. Taylor, 451 U.S. 257 (1981) (loss of tangible personal property by prison official was deprivation of property under color of state law actionable if the deprivation was without due process).

keeping the latter within narrow limits, is a legitimate concern for the Court. The various states should be free to adopt different tort rules based upon each state's balance of competing policy interests. Federal intrusions upon state autonomy in defining its tort policies should be avoided. However, state officials must be bound by the limits of the Constitution. The Constitution defines a minimal nationwide standard of behavior which state officials cannot violate in dealing with their citizens. A substantive due process claim alleges a violation of that standard.

The constitutional tort differs primarily from the common-law tort in that the constitutional tort alleges a violation of the public trust. The constitutional tort remedy for violation of substantive due process protects against overreaching governmental intrusion into

our most sacred personal guarantees of life, liberty and property. See, Rochin v. California, 342 U.S. 165, 169 (1952) (behavior which offends those canons of decency and fairness which express the notions of justice violates the due process clause).

The relationship between the government and the individual is radically different than the common-law tort claimant's relationship with a fellow citizen. Individuals generally cow to government threats and use of force in circumstances wnere they might either resist or flee or turn to the government for help if similarly harmed or threatened by some private person. For this reason, victims are more vulnerable to the exericse of illegitimate or excessive force by government actors.

More importantly, the role and function of government requires accountability as guaranteed by the Constitution. The

function of government is to serve the people and to enhance the conditions of life. The broad purpose of all constitutional limits on government power is to try to ensure that government does not stray from that role. Citizens sacrifice individual control and power to the government relying on the government to protect the citizen in a society or individuals. It is fundamental in the concept of our Constitution, however, that the government must treat each individual with some minimal level of concern and respect for their well-being, even when it has good reason for doing that individual some harm. Intentionally abusive conduct by a government actor violates this duty, and elevates the wrong to a constitutional tort because the victim is dominated by the air of governmental authority, and then helpless with the realization that there is no place to turn for help.

Further, the loss of faith in government protection separates the constitutional tort from the common-law tort. See, Wells & Eaton, Substantive Due Process, supra, 18 Ga. L. Rev. at 228-232.

In analyzing a constitutional tort claim, the Court must determine whether the defendant(s)' conduct has passed the boundary of acceptable governmental behavior toward its citizens. Four principles suggested by two commentators which would require a constitutional tort remedy are:

> (1) When the defendant acts with an impermissible motive and ill will toward the plaintiff;
>
> (2) When his intrusion on the plaintiff is unreasonably disproportionate to the legitimate goal that the intrusion serves;
>
> (3) When the defendant's recklessness causes injury to a plaintiff under substantial control by the state; or
>
> (4) When a defendant recklessly harms a plaintiff not under state supervision.

Wells & Eaton, Substantive Due Process, supra, 18 Ga. L. Rev. at p. 276-237; See also, Johnson v. Glick, 481 F.2d 1028 (2d Cir. 1973) (A court must look to such factors as the need for application of force, the relationship between the need and the amount of force used, the extent of injury inflicted, and whether force was applied in good faith).

In this action, Dr. Grier alleges that the Respondents intentionally violated state law in seizing the golf course, and that while the proprty was in Respondents' control, they recklessly failed to maintain the property, causing severe damage to the property. Dr. Grier also alleges that Respondents burglarized the club house, stole Dr. Grier's personal property, and then conspired with the Sheriff to cover up the investigation. The Respondents are alleged to have acted intentionally and with bad and impermissible

motives. Sellers converted property to his own use, and the other Respondents were covering up criminal behavior to escape liability. The intrusion onto the golf course in seizing the maintenance shed and in refusing to allow Dr. Grier to maintain the property was disproportionate to the legitimate government interest in collecting monies owed for back taxes. Dr. Grier attempted to maintain his own property, but due to the seizure of the maintenance shed, and particularly the watering heads to the sprinklers, Dr. Grier could not maintain the property. The Respondents were specifically warned of the danger to this property and were requested to maintain the property. The Respondents' refusal to care for the property evidences at least reckless disregard for Dr. Grier's property. This intentional, abusive and criminal behavior by state officials toward one of its citizens

is exactly the kind of behavior which transcends common-law tort, and violates that minimum standard of concern and respect for the individual which lies at the heart of the substantive due process doctrine. See, Wells & Eaton, Substantive Due Process, supra, 18 Ga. L. Rev. at p. 230, n. 114.

In recounting the facts alleged in Dr. Grier's complaint, the Fourth Circuit recited Dr. Grier's allegations of intentional misconduct, fraud, criminal trespass and conversion, and conspiracy to obstruct justice.(A16-19) In dismissing the substantive due process claim, however, the Fourtn Circuit only referred to Respondents' failure to follow established state procedures in weighing the wrongdoing alleged by Dr. Grier.(A32) The Fourth Circuit absolutely disregarded the very serious allegations of abuse presented by Dr. Grier, and relied only upon

the most insignificant complaint in holding that no substantive violation occurred.(A32) Petitioner urges this Court to weigh all of the allegations in Dr. Grier's complaint in applying substantive due process analysis.

The Fourth Circuit also admitted that the "shocks the conscience" standard is not the test to weigh Dr. Grier's allegation of a substantive due process violation.(A29) When the Fourth Circuit did review the alleged wrongdoing, however, the court again only referred to the procedural violation alleged in the complaint and held that such behavior does not approach the type of misconduct that has been found "shocking to the conscience."(A32)

Petitioner requests this Court to establish some workable guidelines which our lower courts can apply to analyze substantive due process claims. Counsel

suggests that the "shocks the conscience" test announced in Rochin v. California, 342 U.S. 165 (1952) correctly focuses on weighing the defendant's behavior, but that this Court must expand on that premise. A substantive due process remedy should be available when a state official acts with an impermissable motive or in bad faith toward a citizen, or when a government intrusion upon the individual is disproportionate to the legitimate goal justifying the intrusion, or when government officials recklessly cause injury to an individual or property when that individual or his property is under government custody or control. See, Wells & Eaton, Substantive Due Process, supra, 18 Ga. L. Rev. at p. 234-252.

The wrongdoing alleged by Dr. Grier evidences a severe breach of the public trust by state officials in depriving Dr. Grier of his property. Section 1983 was

intended to provide a supplemental constitutional tort remedy for just such fundamental wrongs committed by state officials. The United States Supreme Court should accept this opportunity to recognize the substantive aspect of a claim alleging deprivation of property without due process of law, and provide guidance to the lower courts in framing the proper analysis for such claims.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

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APPENDIX

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Complaint A34

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

ROCKINGHAM DIVISION

STATE OF NORTH CAROLINA, in relationship with JOHN C. GRIER, JR.,	:	
Plaintiff	:	
v.	:	C-83-443-R
BOARD OF COMMISSIONERS FOR MOORE COUNTY, et al.,	:	
Defendants	:	

MEMORANDUM OPINION AND ORDER

WARD, Chief Judge

This matter comes before the Court on motions to dismiss filed by defendants Williams, Sellers, Richardson, Moore County Board of Commissioners, and the County of Moore (August 30, 1983). The Complaint (June 2, 1983), as amended (July 26, 1983), alleges nine causes of action. The first and second causes of action are based on 42 U.S.C. §§ 1983 and 1985(3)

respectively, and the remaining counts are pendent state claims alleging negligence, trespass, conversion, fraud, breach of fiduciary duties, and claims pursuant to bonds executed on behalf of public officials. The State of North Carolina has not appeared in this action and is a party in relation with plaintiff only in the ninth cause of action which is brought against the official bonds of defendants pursuant to N.C. Gen. Stat. § 109-34. The Court will dismiss the Complaint pursuant to Fed.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief can be granted.[1]

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[1]Neither the absence of a motion to dismiss from defendant Whipple nor the lack of the motions filed to raise the particular ground on which the Court relies is a bar to dismissal of the entire Complaint. The Court may on its own initiative note the inadequacies of the Complaint and dismiss it for failure to state a claim. 5 C.Wright and A.Miller,

In considering these motions to dismiss the Court has construed the Complaint in the light most favorable to plaintiff and accepted his allegations as true. 5 C.Wright and A.Miller, Federal Practice and Procedure § 1357 at 594 (1969). Plaintiff is a former shareholder of Golf Investors, Inc. which at all times pertinent owned Holly Hills Golf Course and Club (hereafter golf course) in Pinebluff, North Carolina. Plaintiff sold his corporate interest in October, 1980, but asumed certain corporate tax debts and retained rights to the instant action. Complaint ¶ 2.

On June 6, 1980, defendant Sellers, Moore County Delinquent Tax Collector, posted a "Notice of Levy and Sale of Property Levied on For taxes" on the golf

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Federal Practice and Procedure § 1357 at 593 (1969).

course clubhouse. Property taxes assessed against the golf course from 1976-79 had not been paid. Complaint ¶¶ 11, 12, 14 and Exhibit A. This notice cited a grant of authority from the Moore County Board of Commissioners and identified the property subject to levy and sale as all personal property located in the golf course clubhouse. Sellers seized the personal property located in the clubhouse and posted lien and no trespassing notices. Sellers closed and locked the maintenance shed (a building separate from the clubhouse) which rendered the tools and equipment located inside inaccessible to plaintiff. Complaint ¶¶ 16-17. Plaintiff contends that the levy was unlawful because the Board of Commissioners never authorized Sellers or anyone to levy on the property. Complaint ¶ 15.

Plaintiff contacted Sellers, defendant Richardson, Moore County Tax Collector, and defendant Williams, member of the Moore County Board of Commissioners, and advised that access to the maintenance shed was imperative because equipment needed to water and maintain the golf course during the hot and dry weather was located therein. Complaint ¶¶ 21, 23, 25. Considering the unpaid taxes and the assumed legality of the levy, these defendants refused plaintiff's request, and Sellers made no attempt to maintain the property. Complaint ¶¶ 22, 24-27. Plaintiff alleges that the golf course fell "into a terrible state of disrepair." Complaint ¶ 26.

On June 19, 1980, Sellers sold various items of personal property stored in the maintenance shed. Complaint ¶ 28. Plaintiff contends the sale was unlawful

because the notice of levy and sale listed clubhouse property only and did not refer to property located in the maintenance shed. Plaintiff's Brief In Response to Defendants' Motion to Dismiss at 14 (November 21, 1983). Property located in the clubhouse was not sold, but on June 22, 1980, plaintiff discovered that the clubhouse had been broken into and the property contained therein stolen. Complaint ¶¶ 28, 30-31. Plaintiff avers that defendant Whipple, Moore County Sheriff, stated that Sellers forcibly entered the clubhouse and took the property. Whipple stated he would personally handle the situation, but no investigation occurred and no charges were brought against Sellers. Complaint ¶¶ 32-34.

A complaint may not be dismissed for failure to state a claim "unless it

appears to a reasonable certainty that plaintiff would be entitled to no relief under any state of facts which could be proved in support of his claim." Johnson v. Mueller, 415 F.2d 354, 355 (4th Cir. 1969), quoted in Adams v. Bain, 697 F.2d 1213, 1216 (4th Cir. 1982). Such certainty exists with resepect to the first and second causes of action of plaintiff's Complaint, the federal question claims upon which subject matter jurisdiction is based.

Section 1983 of Title 42 of the United States Code authorizes a civil action for the deprivation of property without due process in violation of the Fourteenth Amendment. Accepting the allegations of the Complaint as true, plaintiff was deprived of property by defendants acting under color of state law. However, the fact of deprivation alone is insufficient

to state a due process claim brought pursuant to 42 U.S.C. § 1983.

> The Fourteenth Amendment protects only against deprivations "without due process of law." Baker v. McCollan, [443 U.S. 137, 145 99 S.Ct. 2689, ___, 61 L.Ed.2d 433, 442 (1979)]. Our inquiry therefore must focus on whether the [plaintiff] has suffered a deprivation of property without due process of law. In particular, [the Court] must decide whether the tort remedies which the State of [North Carolina] provides as a means of redress for property deprivations satisfy the requirements of procedural due process.

Parratt v. Taylor, 451 U.S. 527, 537, 101 S.Ct. 1908, _____, 68 L.Ed.2d 420, 430 (1981).

In Parratt, a state prisoner claimed that a prison official's negligent loss of the inmate's personal property violated his Fourteenth Amendment right to due process. The Supreme Court held that a property deprivation which resulted from a random and unauthorized act by a state employee, rather than from some

established state procedure, did not allege a due process claim. Under such circumstances, a predeprivation hearing is not practical or necessary, and due process is afforded if the state provides means by which the plaintiff can receive redress for the deprivation. Parratt v. Taylor, 451 U.S. at 541, 543, 68 L.Ed.2d at 432, 434. This holding is not limited to negligent deprivations of property but applies to random and unauthorized intentional deprivations of property as well. Palmer v. Hudson, 697 F.2d 1220 (4th Cir. 1983), cert. granted, ____ U.S. _____, 77 L.Ed.2d 1386 (June 27, 1983); see Wilkins v. Whitaker, 714 F.2d 4 (4th Cir. 1983) (Parratt v. Taylor governs both negligent and intentional deprivations of property).

As in Parratt, the property deprivation suffered by plaintiff

"occurred as a result of the unauthorized failure of agents of the State to follow established state procedure." 451 U.S. at 543, 68 L.Ed.2d at 434. Plaintiff does not contend that the state procedure under which Sellers purported to act is unconstitutional. See Town of Hudson v. Martin-Kahill Ford, 54 N.C.App. 272, ____, 283 S.E.2d 417, 420 (1981), disc. rev. denied, 304 N.C. 733, 288 S.E.2d 804 (1982)(N.C. Gen. Stat. § 105-366 is constitutional). Plaintiff's damages resulted from Sellers' actions and even if those actions were directed by others, Complaint ¶ 37, any loss resulted from random or isolated incidents of unauthorized conduct, not "established state procedure." Thus, plaintiff has not stated a claim under 42 U.S.C. § 1983 if the State of North Carolina provided him with a constitutionally adequate avenue to redress the deprivation of his property.

A taxpayer may challenge the enforcement of a collection of a tax, N.C. Gen. Stat. § 105-381; however, a court may not enjoin collection unless the tax is illegal or levied for an illegal or unauthorized purpose. N.C. Gen. Stat. § 105-379(a). Since plaintiff does not challenge the legality of the taxes and in fact paid them in full, Complaint ¶ 11, an action to quash the notice of levy and sale may have been fruitless. Nevertheless, plaintiff had ample avenues for relief in state law tort actions.[2] If the levy and sale were unauthorized and conducted contrary to state law, plaintiff at a minimum had claims for trespass and

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[2]As indicated by the seven pendent state claims of the Complaint (causes of action three through nine), the opportunity to be heard in the courts of North Carolina is no mystery to plaintiff.

conversion.[3] Moreover, plaintiff would not be barred by governmental immunity because public officials in North Carolina enjoy no special immunity for unauthorized acts or acts outside their official duties. State ex rel. Jacobs v. Sherard, 36 N.C.App. 60, ____, 243 S.E.2d 184, 188, disc. rev. denied, 295 N.C. 466, 246 S.E.2d 12 (1978); Gallimore v. Sink, 27 N.C.App. 65, ____, 218 S.E.2d 181, 183 (1975). Therefore, since plaintiff's due process claim is based on a property deprivation which resulted from random, unauthorized acts, and because the State

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[3]Trespass is the unauthorized entry on land of another. Keziah v. Seaboard Air Line R. Co., 272 N.C. 299, 158 S.E.2d 539 (1968). Conversion is the unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another. The subsequent application of the converted property and the fact that the defendant did not derive benefit from the conversion are irrelevant. Gallimore v. Sink, 27 N.C.App. 65, 218 S.E.2d 181 (1975).

of North Carolina provided plaintiff with an opportunity for a meaningful hearing to remedy any resulting damages, the first cause of action does not state a claim under 42 U.S.C. § 1983 upon which relief can be granted.

Plaintiff's second cause of action, founded on 42 U.S.C. § 1985(3), also fails to state a claim upon which relief can be granted. A required element of a claim under section 1985(3) is "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." Griffin v. Breckenridge, 403 U.S. 88, 102, 91 S.Ct. 1790, 1798, 29 L.Ed.2d 338, 348 (1971), quoted in Ward v. Conner, 657 F.2d 45, 47 (4th Cir. 1981), cert. denied, 455 U.S. 907 (1982). Plaintiff does not allege that defendants' actions were motivatred by racial, religious, national origin, or

other invidiously discriminatory intent.

Because the federal question claims on which subject matter jurisdiction is based do not survive the Fed.R.Civ.P. 12(b)(6) motion, the pendent state claims, causes of action three through nine, should be dismissed without prejudice. "[I]f the federal claims are dismissed before trial, . . . the state claims should be dismissed as well." United Mine Workers v. Gibbs, 383 U.S. 715, 726, 86 S.Ct. 1130, 1139, 16 L.Ed.2d 218, 228 (1966).

IT IS, THEREFORE, ORDERED that defendants' Motions to Dismiss be, and the same hereby are, GRANTED. A Judgment of Dismissal will be entered accordingly.

s/Hiram H. Ward

United States District Judge

December 19, 1983.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 83-2229

State of North Carolina,
in relationship with
John C. Grier, Jr.,

Appellant,

v.

Board of Commissioners for Moore County, et al.,

Appellees.

Appeal from the United States District Court for the Middle District of North Carolina, at Rockingham. Hiram H. Ward, District Judge. (C/A 83-443)

Argued: May 8, 1984 Decided: Sept. 27, 1984

Before RUSSELL and ERVIN, Circuit Judges, and HAYNSWORTH, Senior Circuit Judge.

Donald T. Bogan (Graham, Cooke, Miles & Bogan on brief) for Appellant; P. Wayne Robbins (Seawell, Robbins, May & Rich on brief) for Appellees.

PER CURIAM:

John C. Grier, Jr., a former part owner of the Holly Hills Golf Club in Pinebluff, North Carolina, appeals from the district court's dismissal of his 42 U.S.C. § 1983 suit against the Moore County Board of Commissioners, the Moore County Tax Collector, and the Moore County Sheriff. Grier alleged that the County defendants had violated his fourteenth amendment rights by depriving him of property without due process of law. Because we believe an adequate remedy at state law was available to Grier, we affirm the judgment of the district court.

I.

At the time the alleged deprivation of property occurred, Grier was a shareholder of Golf Investors, Inc. Golf Investors owned the Holly Hills Golf Course and Club in Pinebluff, North Carolina. Although

Grier sold his corporate interest in Golf Investors in October of 1980, he specifically retained rights to bring this suit.

Between 1976 and 1979, Golf Investors, Inc. failed to pay personal and real property taxes owed to Moore County. On May 27, 1980 the County notified the plaintiff that it intended to hold a tax lien sale of the property on June 2, 1980. Golf Investors continued to withhold payment; thus on June 6, 1980, the Delinquent Tax Collector for Moore County, Carl W. Sellers, seized and levied on the Holly Hills Golf Club. Acting under an order from the Board of Moore County Commissioners, Sellers padlocked the clubhouse and maintenance shed and posted "no trespassing" signs on the buildings. Sellers also posted a "Notice of Levy and Sale of Property Levied on for

Taxes" on the golf course clubhouse. The notice stated that the County had levied on all of the personal property in the clubhouse and that the levy and seizure had been carried out "pursuant to an order of the Board of Moore County Commissioners issued under authority of [N.C.Gen.Stat.] 105-321."

On the day of the seizure Grier complained to Sellers, the Moore County Board of Commissioners, and the Moore County Tax Collector that without access to the maintenance shed the golf course would suffer great damage in the hot, dry, summer weather. The County refused to grant the plaintiff access to the shed and proceeded to sell equipment stored there. After the sale the plaintiff discovered that the clubhouse had been burglarized and that all of the property kept in the building -- golf balls, golfing apparel,

and snack shop appliances -- had been stolen. According to Grier, Sellers committed the burglary and then conspired with Jerome L. Whipple, the Sheriff of Moore County, to cover up the investigation.

In his complaint Grier alleged that Sellers, acting with the knowledge and acquiescence of the other defendants, deprived Grier of property without due process of law by seizing property not designated in the notice of levy and allowing the course to fall into disrepair. Grier made numerous specific allegations in his lengthy complaint, but at bottom he contended that the County had intentionally deprived him of property by deliberately violating North Carolina state levy procedures. Tacked on to this § 1983 claim were a series of additional claims based on state law causes of action

for negligence, trespass, conversion, fraud, and breach of fiduciary duties.

The district court dismised Grier's suit for failure to state a claim upon which relief could be granted. The court reasoned that because an adequate remedy was available at state law Grier had failed to establish a violation of due process. Parratt v. Taylor, 451 U.S. 527 (1981).

On appeal, Grier argues that Parratt is not applicable to the facts of this case. Three arguments are offered: first, Grier insists that the alleged wrongdoing did not constitute random or isolated incidents of unauthorized conduct as in Parratt, but rather amounted to an established policy and "governmental custom" of the County that was approved by the Board of Commissioners. Second, Grier argues that Parratt did not purport to

cover intentional deprivations of the type involved here. Third, the appellant contends that the deprivations not only violated his fourteenth amendment procedural due process rights, but that they violated his substantive due process rights as well. Substantive due process, Grier asserts, does not fall within the purview of Parratt.

To establish a claim under 42 U.S.C. § 1983 a plaintiff must prove that he was deprived of "rights, privileges, or immunities secured by the Constitution and laws" of the United States. Baker v. McCollan, 443 U.S. 137, 146-47 (1979); Paul v. Davis, 424 U.S. 693 (1976); Fox v. Custis, 712 F.2d 84, 87 (4th Cir. 1983). In this case the plaintiff alleges a violation of the due process clause of the fourteenth amendment. As a general matter, a random act of unauthorized

wrongdoing will not violate the due process clause of the Constitution if an adequate remedy exists at state law. Parratt v. Taylor, 451 U.S. 527 (1981). There is no dispute over the availability of adequate state remedies for the alleged wrongdoing committed here. If Parratt controls, therefore, this suit must be dismissed to state court. Accordingly, all of Grier's arguments attempt to establish that Parratt is inapplicable to this case.

A.

We find Grier's first argument -- that Parratt is inapplicable because the alleged wrongdoing did not involve random incidents of unauthorized conduct -- unpersuasive. In Parratt the Supreme Court held that the negligent loss of a prisoner's hobby kit did not constitute a violation of due process if an adequate state remedy existed at state law. The

rationale behind the Court's ruling was based on the practical consideration that where the negligent act was the "result of a random and unauthorized act by a state employee" it was not possible to provide a meaningful pre-deprivation hearing. The Court reasoned that because the state cannot predict precisely when the deprivation will occur, the state action -- and thus the alleged deprivation of due process -- cannot be considered complete until the state has had an opportunity to provide a post-deprivation remedy:

> It seems to us that there is an important difference between a challenge to an established state procedure as lacking in due process and a property damage claim arising out of the misconduct of state officers. In the former situation the facts satisfy the most literal reading of the Fourteenth Amendment's prohibition against 'State' deprivation of property; in the latter situation, however, even though there is action under color of state law sufficient to bring the amendment into play, the state action is not necessarily complete.

Parratt 451 U.S. at 542. The court concluded, therefore, that "the existence of an adequate state remedy to redress property damage inflicted by state officers avoids the conclusion that there has been any constitutional deprivation of property without due process . . . ." Id.

Grier contends that Parratt is inapplicable because the element that proved so critical to the outcome of that case -- the randomness of the challenged act -- is not present here. Grier points out that the complaint specifically alleges that the chairman of the Board of Commissioners, and the County Tax Collector established a "policy" of deliberately disregarding their responsibilities under North Carolina state law. Grier also notes that his complaint alleges that Sellers acted in concert with his supervisors on the Board

of Commissioners, and, therefore, the conduct complained of on Sellers' part was in effect the "custom, policy and established procedure of the county." Accordingly, it is Grier's position that the activity challenged here is similar to that found in Monell v. Department of Social Services of City of New York, 436 U.S. 658 (1978), where the Court held that a § 1983 suit can be brought against a municipality provided the alleged violation is the result of a municipal "policy statement, ordinance, regulation, decision or 'governmental custom'".

We are not persuaded that Grier has alleged facts which, even if true, would support a claim that the County has an established policy of depriving county residents of property without due process. The complaint describes conduct related to one isolated incident of

alleged wrongdoing. The complaint does not claim that the County has injured anyone other than Grier and the Holly Hills club with its levy procedures. One episode of wrongdoing, no matter how egregious, is insufficient to create a governmental "custom of policy."

Furthermore, the complaint itself states repeatedly that Sellers acted without the authority of the Board of Commissioners in levying on the property. Thus even if Seller's actions were tacitly directed by superiors interested in subverting established law, any loss suffered by Grier resulted from randomly inflicted unauthorized acts carried out by an individual defendant. Viewed in this light, the complaint in essence amounts to an allegation of injury caused by the defendants' failure to adhere to established state policy, rather than an

allegation of injury resulting from the implementation of an unlawful or unconstitutional state policy. On this point we find Grier's reading of the complaint somewhat disingenuous.

B.

Grier's other two arguments need not detain us long. This court has expressly held that the Supreme Court's ruling in Parratt is applicable to random and unauthorized intentional acts. Wilkins v. Whitaker, 714 F.2d 4 (4th Cir. 1983); Palmer v. Hudson, 697 F.2d 1220, 1223 (4th Cir. 1983). Our ruling in Hudson was recently affirmed by the Supreme Court. Hudson v. Palmer, 52 U.S.L.W. 5052 (U.S. July 3, 1984). We decline plaintiff's counsel's offer to ignore or "overrule" this binding precedent and hold Parratt applicable.

Similarly, we find Grier's substantive due process argument unpersuasive. A

fifth or fourteenth amendment claim may take the form of "procedural due process" or "substantive due process." Hall v. Tawney, 621 F.2d 607, 610-13 (4th Cir. 1980). The distinction between these two types of due process claims is best summarized by Judge Keeton in Schiller v. Strangis, 540 F. Supp. 605 (D. Mass. 1982):

> Under "procedural due process," the claimant is alleging that the state has unlawfully interfered with a protected liberty or property interest by failing to provide adequate procedural safeguards. The claim is that the procedures used by the state in effecting the deprivation of property or liberty were inadequate in light of the significance of the affected interest. The constitutional violation is established by proving a "property" or "liberty" interest, proving a "deprivation" of that interest "without due process of law," and proving that the deprivation occurred "under color of state law." See, e.g., Parratt v. Taylor, 451 U.S. 527, 536-37, 101 S.Ct. 1908, 1913-14, 68 L.Ed.2d 420 (1981); Ingraham v. Wright, 430 U.S. 651, 672, 97 S.Ct. 1401, 1413, 51 L.Ed.2d 711 (1977). Distinguishable from "procedural due process" claims, are those claims that have been analyzed under the rubric of "substantive due process."

> "Substantive due process" cases have held that although no specific provision of the Bill of Rights has been violated, the state's conduct was such as to "shock the conscience" of the court and, therefore, to violate the due process clause. Rochin v. California, 342 U.S. 165, 172, 72 S.Ct. 205, 209, 96 L.Ed. 183 (1972). See Hall v. Tawney, 621 F.2d at 607 (corporal punishment in public school); Johnson v. Glick, 481 F.2d 1028, 1032-33 (2d Cir.) (unprovoked attack by jail guard on pre-trial detainee), cert. denied sub nom. John v. Johnson, 414 U.S. 1033, 94 S.Ct. 462, 38 L.Ed.2d 32 (1973). A "substantive due process" claim is, fundamentally, not a claim of procedural deficiency, but, rather, a claim that the state's conduct is inherently impermissible.

540 F. Supp at 613-14. Substantive due process claims need not be limited to wrongdoing that meets the "shocks the conscience" standard. The Supreme Court has held that conduct which violates a select group of "fundamental rights" protected under the liberty clause of the fourteenth amendment may also form the basis for a substantive due process claim. See Roe v. Wade, 410 U.S. 113

(1973) (right to abortion is fundamental right); Shapiro v. Thompson, 394 U.S. 618 (1967) (right to travel is fundamental right); Griswold v. Connecticut, 381 U.S. 479 (1965) (right to privacy is fundamental right).

Once a substantive due process violation has been properly alleged Parratt may not be used to deny relief. See Parratt at 545, 552-53 (Powell, J. and Blackmum, J. concurring); see also Palmer v. Hudson, 697 F.2d at 1222, n.2, aff'd 52 U.S.L.W. 5052 (U.S. July 3, 1984) (substantive due process claim not affected by availability of state tort remedies). Thus, we agree with Grier that if a violation of substantive due process was properly alleged then the district court erred in dismissing the suit.[1]

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[1]We need not determine whether a violation of Grier's substantive due

We do not believe, however, that Grier's allegations -- even if true -- support such a claim. Although we recognize that the line distinguishing violations of procedural due process from violations of substantive due process has not always been clear,[2] the nature of

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process rights actually occurred. When reviewing a motion to dismiss for failure to state a claim upon which relief can be granted we are required to construe the complaint in "favor of the complaining party" and "accept as true all material allegations of the complaint." Warth v. Seldin, 422 U.S. 490, 501 (1975). Thus, if any reading of Grier's complaint could in theory establish a violation of substantive due process then we must reverse the lower court. For the reasons that follow supra at 11-12 we do not believe that even the most favorable reading of the complaint can support Grier's claim.

[2]See Wells & Eaton, Substntive Due Process and the Scope of Constitutional Torts, 18 Ga. L. Rev. 201, 234-36 (1984) (discussing difficulties courts have had applying "shocks the conscience" standard and advocating a new, broader set of criteria for determining when a substantive due process claim has been made).

the wrong alleged here simply does not rise to the level of substantive due process. First, the wrongdoing alleged by Grier does not approach the type of conduct that has been found "shocking to the conscience". Levying on the wrong property is not to be condoned, but given that Golf Investors had persistently refused to pay its taxes, we are hardpressed to conclude that the County's technical violations of state law, if true, were in any way "shocking." Surely, they cannot even be compared with the grieviousness of the injury inflicted in Tawney or Rochin. Thus, regardless of the standard applied[3] we do not believe the claim crosses into the realm of substantive due process. Rather, taking the complaint as true, Grier has

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[3]See supra n.2.

established only that the County did not follow established state procedures in executing the levy.

Second, the alleged wrongdoing does not violate one of the enumerated list of "fundamental rights." Grier has not alleged the violation of a privacy right or other liberty interest here.

In our view, therefore, these allegations amount to nothing more than a claim that Grier was deprived of property without procedural due process.

III.

For the foreogoing reasons we hold that the district court properly dismissed the case under Parratt. We express no view on the appellant's state law claims.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

Civil Action No. C-83-443-R

STATE OF NORTH CAROLINA, in relationship with JOHN C. GRIER, JR., Plaintiff,	)	
vs.	)	COMPLAINT
BOARD OF COMMISSIONERS FOR MOORE COUNTY; and LEE WILLIAMS, individually and in his capacity as Chairman of the Board of Commissioners for Moore County; CARL W. SELLERS, individually and in his official capacity as Delinquent Tax Collector for Moore County; DON A. RICHARDSON, individually and in his official capacity as Tax Collector for Moore County; JEROME L. WHIPPLE, individually and in his official capacity as Sheriff of Moore County; JOHN DOE, INC., an unknown surety on the official bonds for various defendants; Defendants.	)	

Plaintiff, complaining of Defendants, does hereby say and allege:

1. Jurisdiction

This is a civil action brought by the Plaintiff seeking damages for the deprivation, under the color of the laws of the State of North Carolina, of rights, privileges and immunities secured to him by the Constitution and the laws of the United States. This cause of action arises under 42 U.S.C. Section 1983 and 1985; jurisdiction is founded upon 28 U.S.C. Section 1343(a) and 28 U.S.C. Section 1331, and the Constitution of the United States. The amount in controversy, exclusive of costs and interest, exceeds Ten Thousand Dollars ($10,000.00). The pendent jurisdiction of this Court is further invoked with respect to Plaintiff's state law causes of action which arise out of the same factual situation as the Plaintiff's claim for deprivation of his civil rights.

2. Parties

The Plaintiff, John C. Grier, Jr., M.d., is a citizen an resident of Moore county, North Carolina. Plaintiff formerly was a shareholder in Golf Investors, Inc., a North Carolina Corporation, which was the owner and operator of a golf course and club house known as Holy Hills Golf Course and Holly Hills Golf Club, located at U.S. Highway No. 1, Pinebluff, North Carolina. Pursuant to a sales contract, assignment and indemity bond dated October 31, 1980, Dr. Grier sold all of his stock in Golf Investors, Inc. Pursuant to that same agreement Dr. Grier personally assumed liability for certain of the corporation's debts, including Moore County real property taxes due on the property prior to 1980. Additionally, Dr. Grier specifically retained an assignment of the

causes of action alleged in this Complaint against the Defendants named herein.

3.

The Defendant, Board of Commissioners for the County of Moore, (hereinafter Board of Commissioners) is the governing body of Moore County, responsible for the hiring, firing and supervising of Moore county employees, and also is responsible for seeing that all statutory requirements relating to the governing of Moore county are faithfully followed.

4.

The Defendant, Lee Williams, was a member of the Board of Commissioners at the time the events complained of herein occurred. Defendant, Williams, is sued both individualy and in his official capacity.

5.

The Defendant, Carl W. Sellers, was

the Moore county Delinquent Tax Collector, at the time the events complained of herein occurred. Defendant, Sellers, is a citizen and resident of Moore County, North Carolina, and is sued both individually and in his official capacity as Delinquent Tax Collector of Moore County, North Carolina.

6.

The Defendant, Don A. Richardson, was the Moore County Tax Collector at the time the events complained of herein occurred. The Defendant, Don A. Richardson, is a citizen an resident of Moore County, North Carolina and is sued both individually and in his official capacity as Tax Collector of Moore County, North Carolina. Defendant, Richardson, was in charge of Tax Collections for Moore County and was the supervisor responsible for the work of Defendant, Sellers.

7.

The Defendant, Jerome L. Whipple, was Sheriff of Moore County at the time the events complained of herein occurred. The Defendant, Whipple, is sued both individually, and in his official capacity. The Plaintiff is informed and believes and, therefore, alleges that Defendant, Whipple, is a resident of the State of New York.

8.

The Defendant, Moore County, is a political subdivision of the State of North Carolina, and was duly notified of Plaintiff's claims as provided by law.

9.

The Defendant, John Doe, Inc., is a fictitious name for the unknown surety or sureties upon the official bonds of the Defendants named herein. When such surety is identified, its name will be

substituted for the fictitious name. Liability is asserted against the official bond in the name of the State of North Carolina, in relation to the Plaintiff, pursuant to N.C.G.S. §109-34, for the neglect, misconduct and misbehavior in the office of the Defendants named herein as described below.

Factual Allegations

10.

At the time the events complained of herein occurred, Golf Investors, Inc., a North Carolina corporation, owned certain property in Moore County, North Carolina, including personal property and the real property located in Sandhills Township, more particularly described in deeds recorded in the Moore County Registry at Deed Book 371, page 283, Deed Book 371, page 278, Deed Book 392, page 646, Deed Book 418, page 328 and Deed Book 466, page

457, which deeds are incorporated herein by reference.

11.

In 1976, 1977, 1978 and 1979, real property taxes assessed against the above-described real property became due and owing to Moore County, North Carolina in an amount of less than $2,000.00 per year. The taxes were not promptly paid, but subsequently have been fully paid by Plaintiff.

12.

In October of 1979, Defendant, Board of Commissioners, appointed Carl W. Sellers Delinquent Tax Collector for Moore County, North Carolina.

13.

On or about May 27, 1980, Defendant, Sellers, notified Plaintiff that a tax lien sale of the subject property would be held June 2, 1980.

14.

Thereafter, in early June of 1980, Defendant, Sellers, posted a document entitled "Notice of Levy and Sale of Personal Property Levied on for Taxes." The Notice recited that, pursuant to an order of the Board of Moore County Commissioners issued under authority of G.S. §105-321 and duly entered in the minutes of said board on September 4, 1979, the Delinquent Tax Collector of the County of Moore, on June 6, 1980, in accordance N.C.G.S. §105-366 and §105-367 levied on the personal property of Golf Investors, Inc. known as Holly Hills Golf Club. The property levied on was described as follows:

> "All personal property within this building known as the clubhouse or pro-shop that is owned, rented, or leased by the taxpayer named above."

The Notice also recited that the property would be sold at auction sale,

12:00 o'clock noon, on June 16, 1980 to the highest bidder for cash. A copy of the Notice is attached hereto as Exhibit A and is incorporated herein by reference.

15.

The September 4, 1979 minutes of the Board of Commissioners does not contain any order authorizing the Delinquent Tax Collector to levy for taxes as stated in the Notice as described above. Plaintiff is informed and believes and therefore alleges that Board of Commissioners never authorized Defendant, Sellers, or anyone, to levy on Plaintiff's property.

16.

On June 6, 1980, prior to 7:00 a.m., the Defendant, Sellers, and a deputy of the Moore county Sheriff's Department entered the premises of the Holly Hills Golf Course and seized the clubhouse and personal property therein. Defendant,

Sellers, posted notices indicating a lien on the property, and he posted "No Trespassing" notices.

17.

Defendant, Sellers, thereafter seized the maintenance shed and the tools and equipment therein, located on the Golf Course property, distant and separate from the clubhouse, and closed and locked the maintenance shed and tools with a heavy chain and lock, making the maintenance shed, tools and equipment inaccessible to the Plaintiff. Additionally, Defendant, Sellers, chained and locked numerous golf carts stored at the maintenance shed.

18.

Mr. Gene Norton, the club manager and an employee of Golf Investors, Inc. arrived at the premises in the early morning of June 6, 1980. Defendant, Sellers, prevented Mr. Norton from

entering the clubhouse, and Defendant, Sellers, denied Mr. Norton access to the clubhouse phone in order to inform Plaintiff of the transactions. Golfers were allowed to play without charge.

19.

At approximately 7:30 a.m., Mr. Norton left the property in order to find a phone and call the Plaintiff. Thereafter Mr. Norton did inform Plaintiff of the transactions.

20.

The Plaintiff immediately attempted to contact Defendant, Sellers, but was unsuccessful.

21.

Thereafter Plaintiff contacted Sellers' immediate supervisor, Defendant, Don A. Richardson, the Moore county Tax Collector, about the situation. Plaintiff informed Defendant, Richardson, that

access to the maintenance shed was imperative in order to care for the property because all the watering heads to the sprinkler system were located in the shed. Plaintiff informed Defendant, Richardson, that without proper care and water, the grass on the golf course would burn out and destroy the property.

22.

Defendant, Richardson, informed Plaintiff that he had to back up his employee and that there was nothing he could do about the situation.

23.

Thereafter on the same day, Plaintiff contacted Mr. Lee Williams, at that time a member of the Moore County Board of Commissioners, and informed Mr. Williams of the situation and the need for access to the golf course in order to maintain

the property. At that time the weather was very hot and dry.

24.

Mr. Williams reviewed the transactions and informed Plaintiff that the actions taken by the delinquent tax collector and the tax collector were legal and that Mr. Williams could do nothing further about the situation.

25.

Plaintiff contacted Defendant, Sellers, later in the day on June 6, 1980 and informed Sellers of the need to maintain the course, and particularly of the need to water the grass. Plaintiff asked Sellers how he could get access to the course for such purposes. Sellers replied "Pay the taxes," and denied Plaintiff any access to the property.

26.

The Defendant, Sellers, did nothing to

maintain or preserve the golf course property and, in fact, allowed the grass to burn out, and allowed the golf course property to fall into a terrible state of disrepair.

27.

Plaintiff continued in his efforts to gain access to the golf course in order to maintain the property but was continually denied access.

28.

On June 19, 1980, Defendant, Sellers, held a sale of various items of personal property seized at the golf course. Defendant, Sellers, sold property stored at the maintenance shed, including several golf carts owned by Golf Investors, Inc. Additionally numerous other items of equipment stored at the maintenance shed, which were necessary to maintain the property, were sold. The personal

property in the clubhouse was not sold or offered for sale on June 19, 1980.

29.

Defendant, Sellers, informed Plaintiff that the Moore County attorney had authorized him to enter the maintenance shed and surrounding grounds, and to sell the equipment found there.

30.

On or about June 22, 1980, Plaintiff discovered that someone had broken into the clubhouse at the golf course and had stolen the personal property contained therein.

31.

At approximately 3:30 p.m. on June 22, 1980, a Moore County deputy Sheriff arrived at the clubhouse and, along with a Sheriff's Detective, investigated the break-in. All items listed on Exhibit B,

attached hereto and incorporated herein by reference, were stolen from the clubhouse.

32.

On Wednesday, June 25, 1980, Plaintiff was informed by Defendant, Sheriff Jerome Whipple, that Defendant, Sellers, the Delinquent Tax Collector, had forcibly entered the clubhouse and taken the property listed in Exhibit B. Defendant, Whipple, also informed Plaintff that he would handle the situation personally, because it was a delicate matter.

33.

Plaintiff is informed and believes and therefore alleges that Defendant, Sellers, unlawfully entered the clubhouse at the Holly Hills Golf Course and unlawfully seized and converted to his own use, all of the property listed in Exhibit B, which is attached to this complaint and incorporated herein by reference.

34.

No further investigation was conducted and no charges were brought against Sellers by Sheriff Whipple, or by any other authority. The Plaintiff is informed and believes and therefore alleges that Defendants, Whipple and Sellers, along with the other defendants and other unnamed employees of Moore County conspired to cover-up the break-in and to deny Plaintiff his rights in the property.

35.

As a result of the failure to maintain the property at the golf course, particularly the failure to water the grass and maintain the fairways, tees and greens despite Defendants' actual knowledge that the property was perishable, the property was severely

damaged while under the control of the Defendants named herein.

First Cause of Action

36.

Pursuant to state and federal authority, Plaintiff has an interest in the real and personal property subject of this action which could not be abridged absent due proces of law. The State of North Carolina provides a procedure for levying and foreclosing on property to collect delinquent taxes, and also directs that an authority who levies upon perishable property shall report such action immediately to the Clerk of Superior Court and request instructions as to the maintenance and sale of such property. The Clerk shall make such orders as he deems advisable for the sale and maintenance of the property. (G.S. 1-339.56)

37.

Defendant, Sellers, failed to follow the prescribed procedures in attempting to collect taxes due on the subject property, with knowledge that such statutory procedures were being violated. As stated above, and in reckless disregard of Plaintiff's rights, Defendant, Sellers, unlawfully seized Plaintiff's property. Further, the other Defendants, as stated above, had actual knowledge of Sellers' unlawful actions and either directed, encouraged, acquiesced or consented to such unlawful actions.

38.

The Defendants had actual knowledge of the perishable nature of the subject property and of Sellers' reckless disregard for the maintenance of such property, and each Defendant failed to take any measures to protect the property

from damage while in the possession and control of Defendants.

39.

As described herein, Defendants' violation of state and federal authority in seizing the property subject of this action, and Defendants' reckless disregard for the care and upkeep of such property while in Defendants' possession and control violated the due process clause of the Fourteenth Amendment of the Constitution of the United States, and the Civil rights Act, 42 U.S.C. §1983, thereby causing Plaintiff damage to his property.

Second Cause of Action

40.

As stated above, Defendants had actual knowledge of the unlawful actions undertaken by Defendant, Sellers, in levying on the property subject of this action and in failing to maintain the

perishable property seized by Defendant, Sellers. Additionally, the Defendants had actual knowledge of Sellers' unlawful break-in and theft of the personal property located in the clubhouse.

41.

With such knowledge, as stated above, Defendants agreed, aided and consented to Sellers' unlawful actions, which resulted in the taking of Plaintiff's property under color of state law without due process of law. Further, the Defendants agreed, consented, and conspired to cover-up the unlawful actions previously described, which resulted in the taking of Defendant's property without due proces of law, and in the deprivation of Plaintiffs's right to equal protection of the laws and other constitutional rights, in violation of the Civil Rights Act, 42 U.S.C. 1985(3).

Third Cause of Action

42.

As stated above, the Defendants, Richardson, Williams, the Board of Commissioners, and Moore County, negligently failed to supervise the actions of Defendant, Sellers, and actually consented to actions taken by Defendant, Sellers, in violation of Plaintiff's constitutional rights. Additionally, Plaintiff is informed and believes that said Defendants were aware of Sellers' lack of discretion and inability to faithfully perform the services of a public officer pursuant to lawful procedures at the time said Defendants hired Sellers, and further became aware of Sellers' inabilities and unlawful behavior during the course of his employment. Said Defendants were negligent in hiring Sellers and were

negligent in failing to properly supervise and dismiss Sellers from his employment, which negligence proximately caused Plaintif's damages.

Fourth Cause of Action

43.

As stated above, Defendant, Sellers, with the knowledge and consent of the other defendants named herein, did trespass and make unlawful and unauthorized entry upon Plaintiff's land, and did damage to Plaintiff's property causing Plaintiff severe damage.

Fifth Cause of Action

44.

As stated above, Defendants, Sellers and Whipple, with the knowledge and consent of the other defendants named herein, converted Plaintiff's property, and unlawfully assumed and exercised control over the Plaintiff's property to

the exclusion of Plaintiff's lawful rights and interests in his property, thereby causing Plaintiff severe damage.

Sixth Cause of Action

45.

As stated above, Defendants negligently and recklessly failed to act in good faith and to carry out the duties of their respective offices. As a result of such negligence, and reckless disregard for Plaintiff's rights, Plaintiff suffered severe damage to his property.

Seventh Cause of Action

46.

As stated above, Defendant Whipple did unlawfully, willfully and corruptly omit to discharge his duties to investigate and bring to prosecution Defendant, Carl W. Sellers, for larceny and for breaking and entering the clubhouse at the Holly Hills Golf Course, within Moore County and

within the jurisdiction of the Moore County Sheriff's Department. As a result of such action, Plaintiff has suffered loss and damage to his property.

Eighth Cause of Action

47.

As stated above, Defendant, Sellers, did commit actual fraud in knowingly falsifying the Notice of Levy, attached hereto as Exhibit A, with the intent that Plaintiff and others would act upon his misstated authority, after which the Plaintiff and others did act upon such misstated authority, resulting in damage and loss of Plaintiff's property.

Ninth Cause of Action

48.

Plaintiff is informed and believes, and therefore alleges, that the Board of Commissioners and Moore county, as principal, and John Doe, Inc., as surety,

duly executed a bond assuring the faithful discharge of the official duties of each Defendant herein, and that such bond was in full force and affect at the time of the occurrences alleged herein. As a result of the Defendants' actions, as set forth above, Defendants are liable to Plaintiff for the damages he has suffered to his property.

49.

By reason of said bond, Moore County, to the extent of such bonds and the extent of such other liability insurance, if any, it had at the times mentioned herein covering Moore County, its officials and its employees, has waived any sovereign immunity as to matters set forth herein.

WHEREFORE, Plaintiff prays the Court as follows:

1. That he have and recover of the Defendants, jointly and severally, an

amount to be determined by a jury in the trial of this action as damages resulting from Defendants' unlawful acts;

2. That he have and recover punitive damages of the Defendants in an amount to be determined by a jury in a trial of this action, for Defendants' intentional or reckless violation of Plaintiff's rights.
3. That he have and recover of Defendants his reasonable attorney's fees related to this action;
4. That the costs of this action be taxed against the Defendants; and
5. That the Court award and order such other and further relief as the Court deems just and proper.

A JURY TRIAL IS DEMANDED

This the 31st day of May, 1983.

GRAHAM, COOKE, MILES & BOGAN

By: s/Donald T. Bogan
Donald T. Bogan
Attorney for Plaintiff
P. O. Box 1829
Greensboro, N. C. 27402
(919) 373-1500

Notice of Levy and Sale of Personal Property Levied on for Taxes

STATE OF NORTH CAROLINA
COUNTY OF MOORE

Notice is hereby given by the undersigned that by reason of the failure of [illegible] to pay to the County of Moore certain taxes, and pursuant to an order of the board of Moore County commissioners issued under authority of G.S. 105-321 and duly entered in the minutes of said board on [illegible], the undersigned has this day [illegible], in accordance with North Carolina Gen. Stat. 105-366 and 105-367 levied on the following described articles of personal property of the said [illegible], to-wit:

[illegible]

Notice is hereby given that pursuant to the authority recited above personal property will be sold at [illegible] on [illegible] to the highest bidder for cash.

This 6th day of [illegible] 19[illegible]

(Signed) [illegible]
Deputy TAX COLLECTOR OF THE COUNTY OF MOORE
By _____
Deputy Tax Collector

EXHIBIT A

BEST AVAILABLE COPY

EXHIBIT B

JUNE 22, 1980

ITEMS MISSING FOLLOWING BREAK-IN OF HOLLY HILLS GOLF CLUB

1	Microwave Oven	590.00
1	Infra-red Oven	45.00
1	Refrigerator	190.00
1	Refrigerator-Freezer	370.00
1	Adding Machine (cash register)	250.00
1	set Ping Woods	70.00
1	set Wilson Light X-1 Clubs	105.00
1	set Dunlop Irons	175.00
1	Burton Golf Bag	28.00
3	All-Star Sunday Golf Bags	57.00
11	Acushnet Putters	143.00
6	Ping Putters	78.00
10	Assorted Used Irons	10.00
3	set Leadcovers	13.50
2	Umbrellas	19.50
22	Golf Towels	13.20
16	Country Club Gloves	64.00
27	Walter Hagen Gloves	114.75
27	Assorted Gloves	67.50
3	Pair Golf Shoes	15.00
1	Shag Bag	8.00
16	1/2 dozen Club Special Balls	74.25
3	dozen Prostaft Balls	32.25
1/2	dozen Wilson L D Balls	5.00
5	1/2 dozen Ram Balls	46.75
12	Golf Jackets	147.00
13	Italian Planter Hats	74.75
10	Golf Hats	42.00
31	Golf Caps	86.80
4	Wool Caps	5.00
4	Jars of Progrip	1.00
21	Prs. of Shoestrings	2.52

BEST AVAILABLE COPY

84-1189

Office-Supreme Court, U.S.
FILED
JAN 28 1985
ALEXANDER L. STEVAS,
CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October 1984 Term

STATE OF NORTH CAROLINA, in relationship with JOHN C. GRIER, JR.;

Petitioner

v.

BOARD OF COMMISSIONERS FOR MOORE COUNTY et al.;

Respondents

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

P. Wayne Robbins

Seawell, Robbins, May, Rich & Scarborough
P. O. Box 310
Carthage, North Carolina 28327

Telephone: (919) 947-2311

Attorney for Respondents

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October 1984 Term

STATE OF NORTH CAROLINA, in relationship with JOHN C. GRIER, JR.;

Petitioner

V.

BOARD OF COMMISSIONER FOR MOORE COUNTY et al.;

Respondents

Respondents respectfully move this Court for the entry of an ORDER denying the Petition for Writ of Certiorari filed herein by the Petitoner. This motion is made pursuant to Rule 22, Rules of the United States Supreme Court and is based upon all documents of record and the following argument.

QUESTION PRESENTED

I. Whether the United States Court of Appeals for the Fourth Circuit correctly affirmed the District Court's Order of Dismissal of Petitioner's 42 U.S.C. §1983 claim for failure to state a claim upon which relief could be granted.

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STATEMENT OF THE CASE

Statement of Proceedings and Nature of the Case.

The Petitioner, John C. Grier, Jr., M.D. (hereinafter called "Dr. Grier"), filed a complaint in the United States District Court, Middle District of North Carolina, for damages pursuant to 42 U.S.C. §1983, and 42 U.S.C. §1985, and seven causes of action based upon pendent state law remedies. The Defendants include County of Moore, Board of Commissioners for Moore County, Lee Williams, former Chairman of said Board, Carl W. Sellers, former Delinquent Tax Collector for Moore County, Don A. Richardson, former Tax Collector for Moore County, Jerome L. Whipple, former Sheriff of Moore County, and also the surety on the official bonds for various defendants.

All Defendants with the exception of former Sheriff Jerome L. Whipple, who failed to answer, filed a Motion to Dismiss pursuant to Rule 12 (b)(6), Federal Rules of Civil Procedure.

In an Opinion and Order filed December 19, 1983, the Honorable H. Ward, United States District Court Judge, dismissed the complaint pursuant to Rule 12 (b)(6), Federal Rules of Civil Procedure, without a hearing. In the Opinion Judge Ward held that the Complaint should be dismissed as to the First Cause relating to 42 U.S.C. §1983, in that the State of North Carolina provided Plaintiff with a Constitutionally adequate avenue to redress the deprivation of his property.

Judge Ward also dismissed the Second Cause of Action founded upon 42 U.S.C. §1985(3), in that Plaintiff did not

allege that any of Defendants' actions were motivated by racial, religous, national origin, or other invidiously discriminatory intent.

Since all other causes of action were pendent state claims, the subject matter did not survive the Federal Rules of Civil Procedure 12(b)(6) Motion. All state claims were dismissed without prejudice.(Pet A1-9)

On appeal to the United States Court of Appeals for the Fourth Circuit, the Circuit Court affirmed the Judgment of the District Court dismissing Petitioner's claim.(Pet A21)

Statement of Facts

Golf Investors, Inc. a North Carolina corporation, was the owner and operator of a golf course and club house

known as Holly Hills Golf Course and Holly Hills Golf Club.(Pet A26) This golf course was operated in the Pinebluff area of Moore County, not in the Pinehurst area as referred to in Appellant's brief at page three.

Prior to June of 1980, Dr. Grier, apparently the major shareholder of Golf Investors, Inc., and Golf Investors, Inc. stubbornly failed and refused to pay personal and real property taxes owing Moore County for the years 1976, 1977, 1978, and 1979.(Pet A26) This refusal continued and in June of 1980 Carl W. Sellers, who had been appointed delinquent tax collector for Moore County, pursuant to the required general order of the Moore County Board of Commissioners (See North Carolina General Statutes §105-321) levied on certain

property of Golf Investors, Inc. (Pet A26,28)

Such levy was made after Plaintiff had been notified on May 27, 1980 of the anticipated levy and seizure.(Pet A26) Payment was not attempted at this time, although clearly Dr. Grier could have easily paid out of personal funds which he subsequently did upon a threatened levy and seizure of the real property. (Pet A26) Sellers seized items of personal property in the Clubhouse and maintenance shed, padlocking and placing "no trespassing signs" on those buildings pursuant to North Carolina General Statutes §105-366 and 105-367. (Pet A28) At no point was the golf course itself seized.

Because the golf course itself was never seized, and since everything seized was in the nature of golf equipment,

metal sprinkler heads or golf carts, nothing perishable was seized.

Dr. Grier was apparently informed immediately after the seizure and attempted to contact officials of Moore County regarding the seizure. Dr. Grier contacted various officials, seeking not to determine how he could pay the taxes, but to inform officials of his need to obtain access to the maintenance shed to obtain watering heads for the sprinkler system.(Pet A29) The Moore County officials related only that it was a lawful levy. (Pet A30) These calls continued, yet it seems that Dr. Grier made no attempts to simply purchase a small number of sprinkler heads to maintain the golf course, or borrow watering heads from other golf courses in the county.

Following the procedure set forth in the North Carolina General Statutes, certain property was sold in June 19, 1980, and other property at a later time. After the sale, Plaintiff's complaint alleges the Plaintiff discovered that the clubhouse had been "broken into" and that property kept in the building -golf balls, golfing apparel, and snack shop appliances-had been "stolen". (Pet A 30,31)

Suffering from a serious misapprenhension of the law, Dr. Grier alleged that Respondent Sellers committed the "burglary".(Petitioner's Brief Page 16) At the time at which the items of personal property were purportedly stolen, the personal property had been seized and was in the legal possession of Defendant Sellers.

At last, Dr. Grier paid the delinquent taxes. Subsequently the golf course was sold in October of 1980, and Dr. Grier retained these alleged causes of action . (Pet A23)

ARGUMENT

THE COURT OF APPEALS FOR THE FOURTH CIRCUIT CORRECTLY CLASSIFIED PETITIONER'S CLAIM AS A PROCEDURAL DUE PROCESS CLAIM WITHIN THE PURVIEW OF PARRATT V. TAYLOR, 451 U.S. 527 (1981) AND INADEQUATE TO STATE A CLAIM UNDER 42 U.S.C. §1983, SINCE THE STATE OF NORTH CAROLINA PROVIDES PLAINTIFF WITH AN ADEQUATE REMEDY AT LAW TO REDRESS THE ALLEGE DEPRIVATION OF PROPERTY.

Plaintiff alleges violation of §1983 of Title 42 of the United States Code

which authorizes a civil action for the deprivation of property without due process in violation of the Fourteenth Amendment. In his complaint Dr. Grier alleges that Sellers deprived Grier of property without due process of law by seizing property not designated in the Notice of Levy and allowing the golf course to fall into disrepair. Grier made numerous allegations in his lengthy complaint, but in sum he contended that the Defendants had deprived him of property by intentionally violating North Carolina State Levy Procedures. Tacked onto this §1983 claim were a series of additional claims based on state law causes of action for trespass, conversion, negligence and fraud.

The District Court dismissed Grier's suit for failure to state a claim upon which relief could be granted. The Court

reasoned that because an adequate remedy was available at state law, Grier had failed to establish a violation of due process. Parratt v. Taylor, 451 U.S. 527 (1981).

In its opinion affirming the District Court's Order of Dismissal of Petitioner's claim, the Fourth Circuit also relies upon Parratt which states:

> The Fourteenth Amendment protects only against deprivations "without due process of law." Baker v. McCollan, [443 U.S. 137, 145, 99 S.Ct. 2689, _____, 61, L.Ed. 2d 433, 442 (1979)]. Our inquiry therefore must focus on whether the [Plaintiff] has suffered a deprivation of property without due process of law. In particular, [the Court] must decide whether the tort remedies which the State of [North Carolina] provides as a means of redress for property deprivations satisfy the requirements of procedural due process...the existance of an adequate state remedy to redress property damage inflicted by state officers avoids the conclusion that there has been any Constitional deprivation of property without due process. Parratt v. Taylor 451 U.S. 527, 537, (1981).

There is no dispute over the availability of adequate state remedies for the alleged wrong doing. The Honorable Judge Ward in his District Court Opinion pointed out that Petitioner's seven state claims of the complaint (causes of action three through nine) indicate that the opportunity to be heard in the courts of North Carolina was no secret to Dr. Grier. (Pet A7).

Thus, if Parratt controls, as both the District and Circuit Courts hold it does, Petitioner's complaint fails to state a claim for which relief can be granted, and was properly dismissed by Judge Ward. Petitioner contends that Parratt is inapplicable to the case at bar and sets forth three arguments in support of this contention. At the risk

of belaboring the issues, and to reiterate Petitioner's contentions, Grier first sought to distinguish Parratt from the case at hand by insisting that the element that was so critical in Parratt, the randomness of the challenged act, is not present her. Grier alleged that the conduct complained of on Sellers' part was in effect the "custom, policy or established procedure of the county" and controlled by Monell vs. The Deparment of Social Services of the City of New York, 436 U.S. 658 (1978), where the Court held that a §1983 suit can be brought against a municipality provided the alleged violation is a result of a municipal "policy statement, ordinance, regulation, decision, or 'governmental custom'". As the Circuit Court pointed out, however, one episode of wrong doing, as here, no matter how egregious, is

insufficient to create a governmental custom or policy. (Pet A 16) No interpretation of the facts could lead to the conclusion that this one incident of levying on Petitioner's property, whether authorized or not, amounts to an established policy or custom.

Grier's other arguments are equally void of reasoning. Primarily, Petitioner argues that Parratt is inapplicable because the deprivation of property violated his substantive due process rights, as well as his procedural due process rights,and that substantive due process claims are outside the scope of Parratt. The Circuit Court agreed with petitioner that, if in fact his allegations involved a violation of his Fourteenth Amendment substantive due process rights, then Parratt is inapplicable and Petitioner may have a

claim that can survive a 12 (b)(6) motion. The Circuit Court relied upon Schiller v. Strangis, 540 F. Supp. 605 (D. Mass. 1982) to illustrate the difference between procedural and substantive due process claims. (Pet A 17, 18) In that case, Judge Keeton summarizes the distinction as follows:

> Under "procedural due process", the claimant is alleging that the state has unlawfully interfered with a protected liberty or property interest by failing to provide adequate procedural safeguards. The claim is that the procedures used by the state in effecting the deprivation of property or liberty were inadequate in light of the significance of the affected interest. The Constitutional violation is established by proving a "property" or "liberty" interest, proving a "deprivation" of that interest "without due process of law," and proving that the deprivation occurred "under color of state law." See, e.g., Parratt v. Taylor, 451 U.S. 527, 536-37, 101 S.Ct. 1908, 1913-14, 68 L.Ed. 2d 420 (1981); Ingram v. Wright, 430 U.S. 651, 97 S.Ct. 1401, 1413, 51 L.Ed. 2d 711 (1977). Distinguishable from "procedural due process" claims, are those claims that have been analyzed

> under the rubric of "substantive due process." "Substantive due process" cases have held that althought no specific provision of the Bill of Rights has been violated, the state's conduct was such as to "shock the conscience" of the court and, therefore, to violate the due process clause. Rochin v. California, 342 U.S. 165, 172, 72 S.Ct. 205, 209, 96 L.Ed. 1983 (1972). See Hall v. Tawney, 621 F.2d at 607 (corporal punishment in public school); Johnson v. Glick, 481 F.2d 1028, 1032-33 (2d Cir.) (unprovoked attacked by jail guard on pre-trial detainee), cert. denied sub nom. John v. Johnson, 414 U.S. 1033, 94 S.Ct. 462, 38 L.Ed. 2d 32 (1973). A "substantive due process" claim is, fundamentally, not a claim of procedural deficiency, but, rather, a claim that the state's conduct is inherently impermissible.

540 F Supp at 613-14. The Fourth Circuit discusses the evidentiary standards regarding substantive due process claims. (Pet A 18,19) Substantive due process claims need not always involve wrong doings that "shock the conscience". The Supreme Court has held that conduct which violates a very select group of

"fundamental rights" protected under the liberty clause of the Fourteenth Amendment may also form the basis for a substantive due process claim. These fundamental rights which have been singled out for special protection include the right to abortion, Roe v. Wade, 410 U.S. 113(1973); the right to travel, Shapiro v. Thompson, 394 U.S. 618(1967); and the right to privacy, Griswold v. Connecticut, 381 U.S. 479 (1965).

The fact remains, as the Fourth Circuit holds, that Grier's allegations-even if true- do not support a substantive due process claim. First, Grier has not alleged one of the list of enumerated fundamental rights. In fact, it remains unclear what specific interest Petitioner alleges. Also, the Court says that the wrongdoing alleged by Grier

falls far short of the conduct that shocks the conscience. The Court states, "levying on the wrong property is not to be condoned, but given that Golf Investors (Grier) had persistently refused to pay its taxes, we are hard pressed to conclude that the county's technical violations of state law, if true, were in any way shocking". (Pet A 20)

In his petition for Writ of Certiorari, Grier now contends, notably for the first time in all the pleadings, that the Fourth Circuit should have considered all of Grier's allegations, taken together, and not only the allegation of improper levy, to decide whether the alleged misconduct was so outrageous as to amount to a substantive due process violation. This reasoning is entirely specious, however, since Grier's

other allegations have no basis in law, and even under the most favorable interpretation do not support any legal claim.

Grier's complaint alleges improper levy on perishable property, burglary, criminal trespass, conversion, larceny and fraud in addition to his allegations that Defendant Sellers levied improperly on maintenance shed property. Complaint 36-48.

Grier alleges improper levy on perishable property, yet it is agreed that at no time was the golf course itself seized. In fact, Grier does not even allege that the golf course itself was seized, merely that non perishable property, such as the clubhouse, maintenance shed and some golf carts were seized.

The trespass and conversion claims are unfounded as well. As Judge Ward points out, trespass is the unauthorized entry of land of another. Keziah v. Seaboard Airline R. Company, 272 N.C. 299, 158 S.E. 2d 539 (1968). Conversion is the unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another. Gallimore v. Sink, 27 N.C. App. 65, 218 S.E. 2d 181(1975). Sellers' entry on the land and seizure of property was indeed authorized by an order from the Board of Commissioners for Moore County issued pursuant to N.C. General Statutes 105-321 (A1); hence, Grier's allegations of trespass and conversion are baseless.

As for Grier's allegations of burglary and larceny, what is the possible legal basis for such claim,

since the property at the time was in the custody of the county government? Burglary is the breaking and entering the house (emphasis mine) of another in the nighttime (emphasis mine), with intent to committ a felony therein. State v. Allen, 186 N.C. 302, 119 S.E. 504, 506. No fact supports such a claim. In fact, the alleged entry by Sellers was not alleged to have been made during the nighttime and was not made into a house. Furthermore, the clubhouse and maintenance shed were already under the control and in the custody of Sellers at the time of the supposed "burglary".

The same rationale applies to Grier's allegations of larceny. Larceny is the wrongful and fraudulent taking away by one of personal goods of another without his consent and against his will with intent to convert to use of the

taker. State v. Boswell, 195 N.C. 496, 142, S.E. 583, 584. How could Sellers possibly commit larceny when the goods taken away from the clubhouse were then in his custody? Such nonsensical, ludicrous allegations of Dr. Grier apparently are made without any understanding of law.

Even if the Fourth Circuit had considered all of Grier's allegations together in deciding whether the alleged misconduct passed into the realm of a substantive due process violation, the conclusion that no substantive due process claim exists would have been the same. Just as one hundred zeros do not add up to one hundred, a half dozen baseless allegations of misconduct do not add up to one substantive due process claim. The Fourth Circuit properly refuted Grier's contention that his

complaint amounted to a substantive due process claim outside the scope of Parratt. The Fourth Circuit was correct in following the majority decision of Parratt and holding that Grier's §1983 claim fails to state a claim upon which relief can be granted, since adequate state remedies were available to Grier in North Carolina state courts.

CONCLUSION

The Fourth Circuit Court of Appeals ruling in this case is plainly correct and does not merit the Supreme Court's review. Indeed, Petitioner's argument-that the alleged misconduct of Sellers constitutes a violation of Petitioner's substantive due process rights- leads to the wholly implausible conclusion that almost every alleged

injury which may have been inflicted by a state official acting under "color of law" is a violation of the Fourteenth Amendment cognizable under §1983.

It is therefore respectfully submitted that the Petition for a Writ of Certiorari should be denied.

ADDENDUM

North Carolina General Statutes §105-321

North Carolina General Statutes §105-366

North Carolina General Statutes §105-367

STATUTES

§105-321. Disposition of tax records and receipts; order of collection.--

(a) County tax records shall be filed in the office of the tax supervisor unless the board of county commissioners shall require them to be filed in some other public office of the county. City and town tax records shall be filed in some public office of the municipality designated by the governing body of the city or town. In the discretion of the governing body, a duplicate copy of the tax records may be delivered to the tax collector at the time he is charged with the collection of taxes.

(b) Before delivering the tax receipts to the tax collector in any year, the board of county commissioners or municipal body shall adopt and enter in its minutes an order directing the tax

collector to collect the taxes charged in the tax records and receipts. A copy of this order shall be delivered to the tax collector at the time the tax receipts are delivered to him, but the failure to do so shall not affect the tax collector's rights and duties to employ the means of collecting taxes provided by this Subchapter. The order of collection shall have the force and effect of a judgment and execution against the taxpayers' real and personal property and shall be drawn in substantially the following form:

State of North Carolina

County(or City or Town) of.....

To the Tax Collector of the County of ...

.....

You are hereby authorized, empowered, and commanded to collect the taxes set forth in the tax records filed in the

office of ..... and in the tax receipts herewith delivered to you, in the amounts and from the taxpayers likewise therein set forth. Such taxes are hereby declared to be a first lien upon all real property of the respective taxpayers in the County of....., and this order shall be a full and sufficient authority to direct, require, and enable you to levy on and sell any real or personal property of such taxpayers, for and on account thereof, in accordance with law.

Witness my hand and official seal, this ..... day of ....., 19...

.....(Seal)
Chairman Board of Commissioners of
.....(County)
(Mayor, City or Town) of.....

Attest:

.....

Clerk of Board of Commissioners of..... County Clerk of the City or Town of .....

(c) The origianl tax receipts, together with any duplicate copies that may have been prepared, shall be delivered to the tax collector by the governing body on or before the first day of September each year if the tax collector has made settlement required by G.S. 105-352. The tax collector shall give his receipt or the tax receipts and duplicates delivered to him for collection.

(d) No tax receipt shall be delivered to the tax collector for any assessment appealed to the Property Tax Commission until such appeal has been finally

adjudicated. (1939, c.310,s. 1103; 1971, c.806, s.1; 1973, c.476, s.193; c.615).

§105-366. Remedies against personal property.--

(a) Authority to Proceed against Personal Property; Relation between Remedies against Personal Property and Remedies against Real Property.- All tax collectors shall have authority to proceed against personal property to enforce the collection of taxes as provided in this section and in G.S. 105-367 and 105-368. Any tax collector may, in his discretion, proceed first against personal property before employing the remedies for enforcing the lien for taxes against real property, and he shall proceed first against personal property.

(1) When directed to do so by the governing body of the taxing unit; or

(2) When requested to do so by the taxpayer or by a mortgagee or other person holding a lien upon the real property subject to the lien for taxes written statement describing the personal property to be proceeded against and giving its location.

No sale of a tax lien or foreclosure of a tax lien on real property may be attacked as invalid on the ground that payment of the tax should have been procured from personal property.

(b) Remedies after Taxes Are Due.- At any time after taxes are due and before the filing of a tax foreclosure complaint under G.S. 105-374 or the docketing of a judgment for taxes under G.S. 105-375, and subject to the provisions of G.S. 105-356 governing the priority of liens,

the tax collector may levy upon and sell or attach the following property for failure to pay taxes:

(1) Any personal property owned by the taxpayer, regardless of the time at which it was acquired and regardless of the existence or date of creation of mortgages or other liens thereon.

(2) Any personal property transferred by the taxpayer to a relative (which shall mean any parent, grandparent, child, grandchild, brother, sister, aunt, uncle, niece, or nephew, or their spouses, of the taxpayer or his spouse).

(3) Personal property in the hands or a receiver for the taxpayer. (It shall not be necessary for the tax collector to apply for an order of the court directing payment or authorizing the levy or attachment, but he may proceed as though

the property were not in the hands of the receiver, and the tax collector's filing of a claim in the receivership proceeding shall not preclude him from proceeding to levy under G.S. 105-367 or to attach under G.S. 105-368.)

(4) Personal property of a deceased taxpayer if the levy or attachment is made before final settlement of the estate.

(5) The stock of goods or fixtures of a wholesale or retail merchant (as defined in Schedule E of the Revenue Act) in the hands of a purchaser or transferee thereof, or any other personal property of the purchaser or transferee or such property, if the taxes on the goods or fixtures remain unpaid 30 days after the date of the sale or transfer, but in such a case the levy or attachemnt must be

made within six months of the sale or transfer.

(6) Personal property of the taxpayer that has been repossessed by on having a security interest therein so long as the property remains in the hands of the person who has repossessed it or the person to whom it has been transferred other than by bona fide sale for value.

(7) Personal property due the taxpayer or to become due to him within the calendar year.

(8) Personal property of a partner in satisfaction of taxes on partnership property, but only after the tax collector:

(a) Has sold the taxing unit's lien for taxes against the partnership real property, if any; and

(b) Exhausted the partnership's personal property through the use of levy and attachment and garnishment; and

(c) Exercised the authority granted him by G.S. 105-364 in an effort to collect the tax due on the partnership's property.

(9) Personal property transferred by the taxpayer by any type of transfer other than those mentioned in this subsection (b) and other than by bona fide sale for value if the levy or attachment is made within six months of the transfer.

(c) Remedies Before Taxes Are Due.- If between the date as of which property is to be listed and the first day of September of the fiscal year for which the taxes are imposed the tax collector has reasonable grounds for believing that

the taxpayer is about to remove his property from the taxing unit or transfer it to another person or is in imminent danger of becoming insolvent, the tax collector may levy or attach that property or any other personal property of the taxpayer, in the manner provided in G.S. 105-367 and 105-368, prior to the first day of September for the taxes to become due on that date. When collected under this subsection (c), the amount of taxes not yet determined shall be computed under the provisions of G.S. 105-359, and any applicable discount shall be allowed.

(d) Remedies against Sellers and Purchasers of Stocks of Goods or Fixtures of Wholesale or Retail Merchants.--

(1) Any wholesale or retail merchant (as defined in Schedule E of the Revenue Act) who sells or transfers the major

part of his stock of goods, materials, supplies, or fixtures, other than in the ordinary course of business or who goes out of business, shall:

(a) At least 48 hours prior to the date of the pending sal, transfer, or termination of business, give notice thereof to the tax supervisors and tax collectors of the taxing units in which his business is located; and

(b) Within 30 days of the sale, transfer, or termination of business, pay all taxes due or to become due on the transferred property on the first day of September of the current calendar year.

(2) Any person to whom the major part of the stock of goods, materials, supplies, or fixtures of a wholesale or retail merchant (as defined in Schedule E of the Revenue Act) is sold or transferred, other than in the ordinary

course of business, or who becomes the successor in business of a wholesale or retail merchant shall withhold from the purchase money paid to the merchant an amount sufficient to pay the taxes due or to become due on the transferred property on the first day of September of the current calenar year until the former owner or seller produces either a receipt from the tax collector showing that the taxes have been paid or a certificate that no taxes are due. If the purchaser or successor in business fails to withhold a sufficient amount of the purchase money to pay the taxes required by this subsection (d) and the taxes remain unpaid after the 30 day period allowed, he shall be personally liable for the amount of the taxes unpaid, and his liability may be enforced by means of a civil action brought in the name of the

taxing unit against him in an appropriate trial division of the General Court of Justict in the county in which the taxing unit is located.

(3) Whenever any wholesale or retail merchant(as defined in Schedule E of the Revenue Act) sells or transfers the major part of his stock of goods, materials, supplies, or fixtures, other than in the ordinary course of business, or goes out of business, and the taxes due or to become due on the transferred property on the first day of September of the current calendar year are unpaid, the tax collector, to enforce collection of the unpaid taxes, may:

(a) Levy on or attach any personal property of the seller;or

(b) If the taxes remain unpaid 30 days after the date of the transfer or termination of business, levy on or

attach any of the property transferred in the hands of the transferee or successor in business, or any other personal property of the transferee or successor in business, but in either case the levy or attachment must be made within six months of the transfer or termination of business.

(4) In using the remedies provided in this subsection (d), the amount of taxes not yet determined shall be computed in accordance with G.S. 105-359, and any applicable discount shall be allowed. (1939, c.310, s.1713; 1951, c.1141, s.1955, cc. 1263, 1264; 1957, c. 1414, ss. 2-4; 1969, c. 305; c. 1029, s.1; 1971, c. 806, s. 1; 1973, c. 564, s.1.).

§105-367. Procedure for levy.-

(a) The levy upon the sale of tangible personal property for tax collection

purposes (including levy and sale fees) shall be governed by the laws regulating levy and sale execution except as otherwise provided in this section.

(b) The tax collector or any duly appointed deputy tax collector shall make the levy and conduct the sale; it shall not be necessary for ther sheriff to make the levy or conduct the sale. However, upon the authorization of the governing body of the taxing unit, the tax collector may direct an execution against personal property for taxes to the sheriff in the case of county or municipal taxes or to a municipal policeman in the case of municipal taxes. In either case the officer to whom the execution is directed shall proceed to levy on and sell the personal property subject to levy in the manner and with the powers and authority normally

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execised by sheriffs in levying and selling personal property under execution.

(c) In addition to the notice of sale required by the laws governing sale of property levied upon under execution, the tax collector may advertise the sale in any reasonable manner, and for any reasonable period of time he deems necessary to produce an adequate bid for the property. The taxing unit shall advance the cost of all advertising.

(d) Levy and sale fees, plus actual advertising costs, shall be added to and collected in the same manner as taxes. The advertising costs, when collected, shall be used to reimburse the taxing unit for advertising costs it had advanced. Levy and sale fees, when collected, shall be treated in the same manner as other fees received by the

collecting official. (1939, c.310, s. 17131 1951, c.1141, s.1; 1955, cc. 1263, 1264; 1957, c.1414, ss.2-4; 1969, c.1029, s. 1; 1971, c. 806, s.1.:

CERTIFICATE OF SERVICE

This is to certify that on the 25th day of January, 1985, service of the foregoing Brief In Opposition To Petition For Writ Of Certiorari filed in the above entitled action was had upon Donald T. Bogan, Graham, Cooke, Miles & Bogan, Post Office Box 1829, Greensboro, North Carolina 27402, by depositing in the United States Mail, postage prepaid, a properly addressed envelope containing a copy of said Brief In Opposition To Peition For Certiorari.

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